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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1287

JOHN JACK STEWART,
Petitioner,

v.

SUPERIOR COURT, PIMA COUNTY, ARIZONA, and THE ATTORNEY GENERAL OF THE STATE OF ARIZONA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, JOHN JACK STEWART, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit rendered in these proceeds on November 21, 1979.

OPINIONS BELOW

The unreported memorandum opinion of the Court of Appeals for the Ninth Circuit appears in Appendix A, infra. The order of the United States District Court for the District of Arizona denying the Writ of Habeas Corpus appears in Appendix B, infra. The opinion of the Court of Appeals, Division Two, of the State of Arizona is reported as *State V. Stewart*, 118 Ariz. 281, 576 P.2d 140 (1978) and appears in Appendix C. The Arizona Supreme Court denied review without opinion.

JURISDICTION

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit affirming the Arizona District Court's

denial of the petition for a writ of Habeas Corpus was filed on November 21, 1979. A petition for rehearing was timely filed and thereafter denied on January 21, 1980.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the action of the United States Court of Appeals for the Ninth Circuit in refusing to grant a petition for a Writ of Habeas Corpus violates Petitioner's due process rights under the Fourteenth Amendment to the United States Constitution, where said court was of the opinion that Petitioner's actions did not violate the statute under which he was charged and where Petitioner contends that his guilty plea was involuntary because he did not realize or understand that his acts were not proscribed by the statute.

2. Whether, under the facts of this case, the sentence of incarceration in the Arizona State Prison for not less than five nor more than ten years is excessive and thus cruel and unusual punishment under the Eighth Amendment to the United States Constitution.

3. Whether, Arizona Revised Statutes §13-320.01 was applied to Petitioner for a purpose not consonant with the purpose of the legislation itself, thus constituting an application of the statute to Petitioner in an arbitrary and discriminatory manner in violation of his due process rights under the Fourteenth Amendment to the United States Constitution.

4. Whether Arizona Revised Statutes §13-320.01 fails to meet the requirements of the due process clause of the Fourteenth Amendment to the United States Constitution because of vagueness.

TABLE OF AUTHORITIES INVOLVED

Constitution of the United States, Amendment XIV, §1:

> ". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

Constitution of the United States, Amendment VIII:

> "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Arizona Revised Statutes §13-320.01:

> "Any person who, pursuant to a scheme or artifice to defraud, knowingly or intentionally obtains or attempts to obtain money, property or any other thing of value by means of false or fraudulent pretenses, representations or promises is guilty of a felony punishable by imprisonment in the state prison for not more than 20 years, by a fine not to exceed $20,000, or both."

STATEMENT OF THE CASE

On January 4, 1977, the Pima County Attorney's Office, State of Arizona, charged Petitioner, JOHN JACK STEWART, by information alleging five counts of obtaining money pursuant to a fraudulent scheme or artifice in violation of Arizona Revises Statutes §13-320.01.

The charges set forth in the information resulted in a finding of probable cause made by a Justice of The Peace at the conclusion of a lengthy preliminary hearing conducted on December 30, 1976. Following the filing of the information, the Petitioner, moved, on January 20, 1977, for a redetermination of probable cause pursuant to Rule 5.5, Arizona Rules of Criminal Procedure. The thrust of said motion was that the State has simply failed to put on any evidence towards that element of the offense dealing with a "scheme or artifice." Said motion was heard, taken under advisement, and on March 2, 1977, denied.

On March 17, 1977, the Petitioner filed a motion to dismiss the information arguing that the applicable statute, A.R.S. §13-320.01 was unconstitutional due to vagueness, and violative of rights secured to Petitioner by the due process clause of the Fourteenth Amendment to the United States Constitution.

Despite the obvious controversy concerning the applicability of Arizona Revised Statutes §13-320.01 to the facts developed at the preliminary hearing and the actions of the Petitioner, a plea agreement was ultimately entered into between the Petitioner and the Pima County Attorney's Office. Under the terms of the agreement, Petitioner would plead guilty to one count of the information on the condition that the remaining four counts would be dismissed. The

change of plea proceedings took place in Superior Court, in and for the County of Pima, State of Arizona, on May 24, 1977. On that date the following exchange took place between the Court and the Petitioner in an effort to determine the proper factual basis for his plea to the charge.

> "THE COURT: If I accept your plea of guilty to count 1 you would be telling me on or about November the 16th of last year you, pursuant to a scheme or artifice intended to defraud or to obtain from Kathleen H. Polley (?) money by means of fraud, false or fraudulent pretenses, or promises.
>
> Did you on or about that date make certain representations to a person by that name,and that you knew these representations were false or misleading?
>
> A. Yes, your Honor.
>
> Q. Did you intend to obtain money or property through the representations made by you?
>
> A. Yes, sir.
>
> Q. You intended to use the proceeds for your own purposes, eventually?
>
> A. Yes, your Honor.
>
> Q. The record may show the court finds there is a factual basis for accepting the plea of guilty to count 1."

The specific conduct to which the Petitioner plead guilty was set forth in count one of the information. Said count accused him of obtaining money from KATHLEEN H. FOLEY, an elderly woman, pursuant to a fraudulent scheme or artifice.

On November 16, 1976, one man, the Petitioner, appeared at Mrs. Foley's house and asked to inspect her roof, to see if any repairs were necessary. Because Mrs. Foley's house was old and had undergone previous roof repairs she permitted the Petitioner to make an inspection. Thereafter, additional workmen arrived at Mrs. Foley's home and proceeded to go up onto the roof. The Petitioner discussed with Mrs. Foley the roof condition and the fact that spray painting the roof with a coat of aluminum paint would keep it in better condition. Petitioner originally requested nine hundred dollars ($900.00) from

Mrs. Foley for spray painting the roof. However, after Mrs. Foley balked, the Petitioner agreed on a price of six hundred dollars ($600.00), although he had been willing to go as low as three hundred dollars ($300.00).

Petitioner ultimately went onto the roof himself and the job was completed approximately one-half hour later. Mrs. Foley was amazed that the work had been completed so quickly. Nevertheless, she asked Petitioner to drive her to the credit union so that she could draw a check and make payment to him. Subsequent to this, Mrs. Foley testified that she had felt she had made a mistake.

Two other elderly women, LOUISE HILLGERT and MARY WORRAL, also testified at Petitioner's preliminary hearing, resulting in other separate counts of the information. These counts were dismissed pursuant to the plea agreement.

Ms. Hillgert testified that Petitioner and two other men came to her house in a truck and sought to solicit house repair business. The roof of her house had been leaking. Accordingly, after Ms. Hillgert climbed a ladder and overlooked the roof to give instructions as to what should be done, she authorized the Petitioner to begin work. While Ms. Hillgert claimed she authorized only a portion of the work, Petitioner, nevertheless, worked on her entire roof and an adjacent roof. Her testimony poses much confusion as to the agreed upon price for the Petitioner's services. Ultimately, Petitioner charged her two hundred and ten dollars ($210.00) and when she balked at paying it, he made no threats and simply walked away. In the end, Ms. Hillgert felt that she had been dumb to pay the bill.

The third woman, Ms. Worral, had several contacts with Petitioner and his co-workers in which he did work on the roof and foundation of her house. Initially, Petitioner had come to her house and inquired about home repair work. In fact, her roof had been leaking. Ms. Worral paid in excess of two thousand dollars for the work and while she felt the costs was high, she nevertheless said nothing.

At the time of sentencing, the trial court had before it a presentence report authored by a deputy of the Investigative Unit of the Pima County Adult Probation Department. That report, together with several other matters of record, established the following facts

concerning Mr. Stewart which were available to the Judge at sentencing: That he was a twenty-nine year old male, married to the same woman for the last eight years, and the father of two young children, ages six and one and one-half years respectively; that he had neither a previous felony arrest record nor a prior felony conviction record and that the charge to which he was pleading was a crime of a non-violent nature; that he was an out-of-state resident who intended to move with his family back to Delaware, his original home State; that he was employable as a painter and had been in that profession for a number of years; and that he had made restitution, through his attorney, to all of the alleged victims in the case. Furthermore, the presentence report smacked of the probation officer's apparent dislike for Mr. Stewart. This dislike was based upon what she felt to be his "overly ingratiating manner," his inability to recall a minor arrest record for misdemeanors, his allegedly false statement as to his education background which falsity was eventually disproven by his trial counsel at the time of sentencing, and his poor performance on a polygraph test that he had submitted to voluntarily. Finally, regardless of the probation officer's obvious dislike for Mr. Stewart, she, however, recognized that he was a good probation candidate as reflected in her primary recommendation to the Court.

The Court sentenced Mr. Stewart on June 13, 1977, to a term in the Arizona State Prison of not less than five years nor more than ten years. Additionally, the Court fined Mr. Stewart in the sum of two thousand five hundred dollars ($2,500.00).

Following sentencing, Mr. Stewart moved for a modification of sentence arguing that the five to ten years of incarceration imposed by the Court was excessive and constituted cruel and unusual punishment as applied to him. Said motion was ultimately denied by the trail court on July 15, 1977.

Petitioner Stewart was allowed to remain free on bail while appealing the judgment and sentence of the Court. Petitioner's judgment and sentence was appealed to the Court of Appeals, Division Two, in and for the State of Arizona. The Court of Appeals affirmed Petitioner's conviction and sentence on January 24, 1978 and remanded the matter to the Superior Court for clarification of the amount of the fine imposed. A Petition for Rehearing was

denied by the Arizona Court of Appeals and the Petition for Review was denied by the Arizona Supreme Court.

Thereafter, a Petition for Writ of Habeas Corpus by a Person in State Custody, pursuant to 28 U.S.C. §2254, was filed in the Federal District Court, for the District of Arizona on April 7, 1978. The Petition was denied on July 6, 1978. Petitioner timely filed a Notice of Appeal and an Application for Certificate of Probable Cause on July 21, 1978. The Certificate of Probable Cause was signed and filed on July 25, 1978. The United States Circuit Court for the Ninth Circuit affirmed the judgment of the District Court on November 21, 1979. A timely Petition for Rehearing was filed and denied on January 21, 1980.

REASONS FOR GRANTING THE WRIT

1. The decision of the Ninth Circuit Court of Appeals, in regard to the voluntariness of Petitioner's guilty plea, directly conflicts with the due process principles enunciated by this Court in the case of ..IcCARTHY V. UNITED STATES.

In *McCarthy v. United States*, 394, U.S. 459 (1969) this Court held that because a plea of guilty is an admission of all the elements of the charge it cannot be a voluntary plea if the defendant doesn't understand the law in relation to the facts. The opinion went on to amplify the point that the judge must conduct an examination to ensure that the acts the defendant admits to constitute the offense charged in order to prevent the situation of a defendant understanding the nature of the charge but not realizing that his conduct does not actually fall within the charge.

At the change of plea hearing the trial court simply asked the Petitioner if he intended to defraud Kathleen Folley pursuant to a scheme or artifice. The Petitioner answered that he did. The Ninth Circuit Court quoted this portion of the change of plea hearing in its memorandum opinion at page 2. The opinion then went on to state quite matter of factly, that:

> "There was clearly a factual basis for the conclusion of the district court upon which that court was entitled to rely without the need for evidentiary hearing."

It is submitted that this is not the case for nowhere in the colloquy with the trial court was there ever any attempt to make sure that the Petitioner's conduct actually amounted to a "scheme or artifice to defraud" and that he understood the legal meaning of the phrase "scheme or artifice to defraud" and how, if at all, his conduct could be fairly related to that phrase.

A scheme to defraud has been defined in reference to the Federal Mail Fraud Statute, 18 U.S.C. §1341, from which Arizona Revised Statutes §13-320.01 was adopted. (See the comments following the Arizona Statute.) According to the cases of *Silverman v. United States*, 213 F.2d 405 (5th Cir. 1959) and *United States v. Bruce*, 488 F.2d 1224 (5th Cir. 1973) interpreting 18 U.S.C. §1341, a scheme is one to defraud only when it is reasonably calculated to deceive persons of ordinary prudence and comprehension.

In the case at bar, Petitioner contends that there was no shceme. However, even assuming that there was a scheme, the Petitioner contends that it was not one that would deceive persons of ordinary prudence and comprehension and therefore said scheme was not one to defraud. In regard to the count Petitioner plead to involving Katherine Folley, there was no scheme as the Petitioner merely stated that painting the roof would make and keep the roof in better condition, which a Detective, during preliminary hearing testimony, agreed that it would. Thereafter the Petitioner did not inveigle Mrs. Foley in any way into letting him do the work on the roof. It is true that she did not ask him to do it; however, the Petitioner merely went onto the roof and did the work unsolicited. Thereafter, Mrs. Foley voluntarily paid him for his services even though she states she did not ask him to do the work. She never declined to pay him, she merely haggled over the price. Therefore, in this instance, there was no scheme to defraud. A person of ordinary prudence and comprehension would understand that perhaps aluminum paint would at least reflect the hot rays of the Arizona sun and protect the roof in a certain manner, but in no way would a person of such prudence and comprehension believe that a coat of aluminum paint would make a bad roof good. In fact, Mrs. Foley told Mr. Stewart that hers was a good roof in the first place.

The United States Court of Appeals for the Ninth Circuit, in the Memorandum Opinion, at page 2, seemingly agrees with the Petitioner's argument that there was no scheme to deceive pursuant to the Arizona Statute. Therein they state as follows:

> "*The evidence does not establish that there was a scheme to deceive;* it does disclose that there was over-persuasion resulting in a grossly inequitable charge without any real meeting of the minds." (Emphasis added)

However, immediately after asserting that the Petitioner's acts did not violate the statute which he was accused of violating they made a bald assertion that there was a factual basis for the United States District Court to rely on without the need for an evidentiary hearing. These statements in the opinion are in direct conflict with each other. If the evidence from the record does not establish a scheme to deceive then there cannot be any factual basis on which the District Court could have relied without an evidentiary hearing.

The Circuit Court uses the cases of *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975) and *Blackledge v. Perry*, 417 U.S. 21, 30 (1974) to bolster its reasoning with the proposition that if a counseled plea of guilty, being an admission of guilt, is voluntary and intelligent it removes the issue of factual guilt from the case. This reasoning in actuality, begs the question in that it completely overlooks the fact that Petitioner has contended from the beginning that his plea was involuntary in that it was entered, after a perfunctory dialogue with the trial judge, without Petitioner's understanding that his conduct did not fall within the parameters of the statute under which he was charged. Furthermore, the *Menna* and *Blackledge* cases, *supra*, cited by the Court below have no bearing whatsoever on this case as they narrowly apply to the waiver of a double jeopardy claim by entering a guilty plea.

The Court below erred in not holding a hearing on the Petition for Writ of Habeas Corpus. The Fourth Circuit in the cases of *Edwards v. Garrison*, 529 F.2d 1374 (4th Cir. 1975); *Crawford v. United States*, 519 F.2d 347 (4th Cir. 1975); and *Walters v. Harris*, 460 F.2d 988 (4th Cir. 1972) has dealt with the change of plea situation in a realistic manner in that in certain circumstances they agree that there are various subtleties under the facade of the guilty plea which if brought to light would show an unconstitutional deprivation of a persons rights. In *Edwards v. Garrison, supra,* the defendant alleged in a sworn Habeas Corpus Petition that he was induced to plead

guilty by his counsel's promise that his sentence would not exceed twenty years. The Court in their decision stated that the defendant was entitled to an opportunity to show the involuntariness of his plea despite the fact that he was represented by counsel and despite the fact that his answers during the change of plea proceeding indicated that he understood that he could be imprisoned for as much as life plus three years. Within its opinion, the Court discussed the phenomenon of many defendants answering questions during the change of plea proceeding in a manner in which they feel they are supposed to answer them merely so that they can get the benefit of the plea bargain. The Petitioner herein, John Jack Stewart, has also made an allegation of involuntariness and lack of understanding within a sworn Habeas Corpus petition. He also within the reasoning of *Edwards v. Garrison, supra*, is entitled to a hearing to show to the court his misunderstanding and/or lack of understanding of the charges against him and the reasons and conditions under which he answered the questions asked by the sentencing judge. This case is similar to the *Garrison, supra*, case and the failure of the United States District Court and the United States Court of Appeals for the Ninth Circuit to order a hearing on the Petitioner's request for a Writ of Habeas Corpus has deprived him of his due process rights under the Fourteenth Amendment to the United States Constitution.

This is true to a greater extent when one takes into consideration the statements of the Ninth Circuit Court wherein they imply that the Petitioner did not commit a scheme to defraud as was charged under the Arizona indictment.

This Court should grant a Writ of Certiorari to prevent a miscarriage of justice where a Petitioner has plead guilty to a charge involuntarily, without the full understanding of the charge and where an Appellate Court admittedly states that the Petitioner's actions did not fall within the parameters of the statute under which he was charged, all in abrogation of Petitioner's due process rights under the Fourteenth Amendment to the United States Constitution.

2. The Court below has applied a test for the determination of cruel and unusual punishment which conflicts with the principles enunciated by this Honorable Court.

This court should grant the Petition for Writ of Certiorari in that the United States Court of Appeals for the Ninth Circuit in their Memorandum Opinion in this matter has used the wrong test as dictated by this Court's opinions in order to determine whether or not sentence imposed upon the Petitioner was cruel and unusual punishment under the Eighth Amendment to the United States Constitution.

In the Ninth Circuit Court's Memorandum Opinion, it is stated on page 3, that:

> "Likewise we find only slight support for appellant's claim of cruel and unusual punishment. The sentence of five to ten years in prison is severe. But we cannot say that the sentence is so shocking that it transgresses constitutional limitation."

It appears that the Ninth Circuit Court in its determination of appellant's cruel and unusual punishment claim has determined that the sentence imposed does not shock the conscious and is therefore constitutional. This test used by the Ninth Circuit Court is not in keeping with the dictates of this Honorable Court in the cases of *Coker v. Georgia*, 97 S.Ct. 2861 (1977), and *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 Law Ed. 2d 859 (1976).

This Court has held in those cases that the Eighth Amendment bars those punishments that are "excessive" in relation to the crime committed. The determination of whether the sentence is excessive and thus unconstitutional must be made if either (1) it makes no measurable contribution to the acceptable goals of punishment and therefore is a purposeless and needless imposition of pain and suffering; or (2) it is grossly out of proportion to the severity of the crime.

The determination of whether the sentence falls within these guidelines must be made on objective factors to the maximum possible extent and not on the mere subjective thoughts of individual justices.

The following facts are those that the Appellate Court should have looked to in applying the above test instead of merely looking at the punishment and the crime in applying the shock of conscious test: Petitioner is a twenty nine year old male who has been married to the same woman for the last eight years and has fathered two

young children, ages six and one and one-half, respectively; Petitioner had no prior felony convictions and in fact, before this incident had never been arrested on a felony charge; the crime to which the Petitioner entered a plea of guilty was a crime of a purely non-violent nature; Petitioner was an out-of-state resident who intended to move with his family back to Delaware, his original home state; Petitioner was not the typical criminal on the "make" for additional victims, rather he was employable as a painter and had been in the profession for a number of years; to the extent Petitioner's crime carried with it a "victim" he had made restitution to all of such alleged victims in his case.

With these facts in mind, the objective finding must be that the five to ten year sentence imposed upon Petitioner does not make any measurable contribution to acceptable goals of punishment, and furthermore, it is grossly out of proportion to the severity of the crime. This coupled with the fact that the Ninth Circuit Court does not believe the evidence shows a scheme or artifice to defraud most certainly deprives the Petitioner of his freedom from cruel and unusual punishment under the Eighth Amendment to the United States Constitution.

3. **The Ninth Circuit Court failed to decide the issue of whether Arizona revised statutes §13-320.01 was applied to Petitioner for a purpose not constant with the purpose of the legislation itself in such a way as to be an arbitrary and discrimatory application of said statute and in violation of his due process rights under the Fourteenth Amendment to the United States Constitution.**

Nowhere in the Memorandum Opinion of the Ninth Circuit Court has the court ruled on the above issue presented to it.

The Petitioner contends that Arizona Revised Statutes §13-320.01 was not reasonably applied to him in this case and that it was not applied for a purpose consonant with the purpose of the legislation itself. Therefore, the statute was applied to the Petitioner in an arbitrary and discriminatory manner and thus in violation of the Petitioner's due process rights under the Fourteenth Amendment to the United States Constitution.

The summary analysis of the Arizona House Bill 2124 (A.R.S. §13-320.01) shows that the paramount intent of the legislature in passing this law was to close the deficiencies in existing law at that time, which "*have become apparent in recent investigations of alleged land fraud operations in this state.*" (emphasis added.)

The summary analysis goes on to explain that at the time the Bill was passed, the primary devise for the prosecution of fraudulent offenses was Arizona Revised Statutes §13-661a(3). This section has to do with obtaining money or property by false pretenses. What the legislators were concerned with at that time was that in order to convict someone under Arizona Revised Statutes §13-661a(3), the prosecution had to show the victim's reliance upon false statements made by the defendant, and furthermore that there was a taking involved. This statute then did not apply to an *attempt* to perpetrate a fraud on certain persons where the victims did not rely upon the false representations and the fraud was not thus completed.

In the case of *Fasulo v. United States*, 47 S.Ct. 200, 201, 27 U.S. 620, 71 L.Ed. 443 (1926), this Court stated that before one can be punished for the violation of a certain statute, it must be shown that his offense is plainly within the statute. The Court also stated that in trying to ascertain the true meaning and application of the statute, one must look toward the evils which called forth its enactment in the first place.

It should be noted that Petitioner could have just as easily been charged under Arizona Revised Statutes §13-661a(3) in that he was accused of a completed act of fraud in taking money thereby from another person. Furthermore, it should be noted that the punishment for theft by false pretenses is set out in Arizona Revised Statutes §13-671 for amounts over $100.00 and said punishment is not less than one nor more than ten years in the state prison. Petitioner could also have been charged under Arizona Revised Statutes §13-312, which is entitled "Obtaining Money or Property by Confidence Game." The punishment for conviction under this statute is not less than one or more than five years in the state prison. However, Petitioner was charged under §13-320.01, which was primarily intended for land fraud schemes and thus for fraud on a grandiose scale, wherein the punishment is by imprisonment in the state prison for not more than twenty (20) years and by a fine not to exceed $20,000.00, or both.

The prosecutor in this case was placed in a position where he could arbitrarily charge this particular Petitioner under the more severe statute if he wished and that is what occurred. Because of this arbitrariness and discrimination in the application of the statute against the Petitioner and because the application of the statute in this case was not commensurate with the intent of its application by the Legislature in passing the legislation, and by virtue of the fact that such arbitrariness and discrimination is possible because of the wording of the statute, then Arizona Revised Statutes §13-320.01 is unconstitutional and that it does not meet the requisites of due process under the Fourteenth Amendment of the Constitution of the United States.

Furthermore, it is the Petitioner's contention that the reason the prosecutor in the instant case charged the Petitioner under the most severe statute possible was not merely the use of prosecutorial discretion but was in actuality because of the vindictiveness of the prosecutor towards this particular Petitioner.

Petitioner, however, was denied the opportunity and the forum in the United States District Court upon his petition for a Writ of Habeas Corpus to present evidence as to the prosecutor's vindictiveness toward Petitioner. Petitioner has no other forum in which to develop and bring forth this kind of evidence. By denying him a hearing on the matter, the courts below could not fully discern the issues involved and could not intelligently decide the legal issue involved.

4. **Arizona revised statutes §13-320.01 violates the due process clause of the Fourteenth Amendment to the United States Constitution because of vagueness.**

Petitioner contends that the statute in question should be declared unconstitutional because it fails to meet the "specificity" requirements of the due process clause of the Fourteenth Amendment to the United States Constitution. Fundamental notions of due process of law dictate that a criminal statute is void and unconstitutional for vagueness when it ". . . fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). Thus, for a criminal statute to pass constitutional muster under the due process clause, it must meet the foregoing tests adopted by this Court.

Close examination of Arizona Revised Statutes §13-320.01 demonstrates that it clearly does not meet the previously mentioned guidelines because it simply does not give adequate notice of the behavior that is forbidden. As the Eighth Circuit Court of Appeals in *United States v. McNeive*, 536 F.2d 1245 (8th Cir. 1976) recognized, the statutory phrase "scheme or artifice" is ridden by a ". . . relative lack of definite standards." 536 F.2d at 1248 Similarly, the Arizona statute is also vague in that it does not define to the slightest degree exactly what is meant by the term "scheme or artifice."

Petitioner contends that the vagueness and thus the unconstitutionality of the statute in question is made even more apparent by comparing it with the Federal Mail Fraud statute, 18 U.S.C.A. §1341. While the language of the Federal Mail Fraud statute is decidedly more specific than its Arizona counterpart, the federal courts have, nevertheless, been cautious in interpreting and applying its proscriptions. In *United States v. Kelem*, 416 F.2d 346, 347 (9th Cir. 1969) *cert. denied*, 397 U.S. 952 (1970), the Court recognized that ". . . §1341 should be carefully and strictly construed in order to avoid extension beyond the limits intended by Congress." Earlier, in *Fasulo v. United States*, 272 U.S. 620, 629 (1926), this Court in construing the predecessor to §1341 had emphasized ". . . before one can be punished, it must be shown that his case is plainly within the statute." Clearly, the specificity which imbues the Federal Mail Fraud statute with validity is lacking upon an examination of A.R.S. §*13-320.01*.

Moreover, A.R.S. §13-320.01 is unconstitutionally vague in that it lacks exacting enforcement provisions. By not defining precisely what is meant by a "scheme or artifice," Petitioner faced the possibility that he would be forced to defend against a number of counts, each carrying a potential of twenty (20) years imprisonment, and a $20,000.00 fine for what could, arguably, amount to no more than a single course of conduct. The statute carries an additional vagueness taint in that it is unclear whether a "scheme or artifice" may be compromised of one alleged incident or whether a number of incidents are first required to compromise the proscribed "scheme or artifice." In sum then, under what circumstances said conduct can be punished is not clear to a man of ordinary intelligence.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

RESPECTFULLY SUBMITTED,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN JACK STEWART)
Petitioner-Appellant,)
vs.) No. 78-2818
SUPERIOR COURT, Pima County)MEMORANDUM
Arizona, and THE ATTORNEY GENERAL)
OF THE STATE OF ARIZONA,)
Respondents-Appellees.)

Appeal from the United States District Court
for the District of Arizona

Before: HUFSTEDLER, TRASK and SNEED, Circuit Judges

Appellant, John Jack Stewart, appeals from the denial and dismissal of his habeas corpus petition. He is an Arizona state

prisoner having pleaded guilty to obtaining money by a scheme to defraud. Ariz. Rev. Stat. §13-320.01.[1]

In this court he contends that the district court erred by failing to hold an evidentiary hearing; that the state statute is void for vagueness; that as applied to him it was applied in an arbitrary and capricious manner; that his guilty plea was and is void because he did not understand the nature of the charge; and that his sentence constitutes cruel and unusual punishment. His state court conviction was affirmed, *State v. Stewart*, 118 Ariz. 281, 576 P.2d 140 (1978) and the Supreme Court of Arizona denied appellant's petition for review. Because the state appellate courts have had an opportunity to review the arguments made to the district court, that court found that appellant had exhausted his state remedies within the meaning of 28 U.S.C. §2254(b). *Thompson v. Procunier*, 539 F.2d 26 (9th Cir. 1976). We agree.

Briefly, it was shown that appellant had approached at least three elderly women and had persuaded each of them to employ him to work on the roofs of their several houses. He had then charged them unconscionably excessive amounts for the work he had performed and materials supplied. The evidence does not establish that there was a scheme to deceive; it does disclose that there was overpersuasion resulting in a grossly inequitable charge without any real meeting of the minds.

At the plea hearing before the State Superior Court, the following took place:

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[1]Ariz. Rev. Stat. §13-320.01 reads as follows:

> "Any person who, pursuant to a scheme or artifice to defraud, knowingly and intentionally obtains or attempts to obtain money, property or any other thing of value by means of false or fraudulent pretenses, representations or promises is guilty of felony punishable by imprisonment in the state prison for not more than twenty years, by a fine not to exceed twenty thousand dollars, or both." Added laws 1976, Chapter 134, § 1, effective June 27, 1976.

"THE COURT: If I accept your plea of guilty to count 1 you would be telling me on or about November the 16th of last year you, pursuant to a scheme or artiface (sic) intend to defraud or to obtain from Kathleen H. Polley(?) (sic) money by means of fraud, false, or fraudulent pretenses, or promises.

Did you on or about that date make certain representations to a person by that name, and that you knew these representation were false or misleading?

A. (MR. STEWART) Yes, your Honor.

Q. Did you intend to obtain money or property through the representations made by you?

A. Yes, sir.

Q. You intended to use the proceeds for your own purposes, eventually?

A. Yes, your Honor."

576 P.2d 140, 142.

There was clearly a factual basis for the conclusions of the district court upon which that court was entitled to rely without the need for an evidentiary hearing. The appellant was represented by an attorney of his choice. A counselled plea of guilty is an admission of guilt and where the plea is voluntary and intelligent it removes the issue of factual guilt from the case. *Menna v. New York*, 423 U.S. 61, 62, n.2 (1975). There was no claim of double jeopardy which would operate to the contrary. *See Blackledge v. Perry*, 417 U.S. 21, 30 (1974).

Nor is the conviction here void because the statute is void for vagueness. The Arizona statute is patterned after the federal mail fraud statute, 18 U.S.C. §1341. It has withstood numerous challenges based upon vagueness grounds. *E.g., United States v. Louderman*, 576 F.2d 1383, 1388 (9th Cir.), *cert. denied*, 439 U.S. 896 (1978); *United States v. Feinberg*, 535 F.2d 1004, 1010 (7th Cir.), *cert. denied*, 429 U.S. 929 (1976).

The charge of "prosecutorial vindictiveness" lacks support in the record at any step in the litigation. Although appellant states the claim he does not support it and we find no record of it. Likewise we find only slight support for appellant's claim of cruel and unusual punishment. The sentence of five to ten yeas in prison is severe. But

we cannot say that the sentence is so shocking that it transgresses constitutional limitation.

The judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

JOHN JACK STEWART, Petitioner,	)	
vs.	)	No. CIV 78-077-TUC-MAR
STATE OF ARIZONA, Respondent.	)	ORDER

John Jack Stewart having petitioned for a writ of habeas corpus pursuant to 28 U.S.C. §2254, and the State of Arizona on behalf of respondents having opposed the petition and having submitted transcripts of proceedings on petitioner's plea of guilty, May 24, 1977, and sentencing, June 13, 1977, the Court, on due consideration of the record before it, concludes as follows:

1. *Findings of Fact*

A. On January 4, 1977, petitioner was charged by information in Superior Court in and for the County of Pima with five counts of obtaining money by a scheme or artifice to defraud, in violation of A.R.S. §13-320.01. The facts underlying the charge were developed at a preliminary hearing, December 30, 1976: In November of 1976, petitioner went to the residence of Mrs. Katherine H. Foley, age 77, and told her he knew the people who had previously worked on her house. After examining the roof of the house, petitioner told Mrs. Foley that he could improve the roof by spraying it with paint and that he would charge $900 for the job. When Mrs. Foley objected, petitioner agreed to a price of $600. According to Mrs. Foley, petitioner worked on the roof for about half an hour, although Mrs.

Foley did not expressly tell petitioner to commence work. Petitioner then drove Mrs. Foley to a credit union to obtain a check and to a bank to cash it. Two other women, ages 80 and 76, testified at the hearing that petitioner had approached them with similar offers. One woman paid petitioner $210 for having painted her roof, and the other paid petitioner $2875 for having worked on the roof and foundations of her house. All three women felt that petitioner had overcharged them.

B. After the filing of the information, petitioner moved for a redetermination of probable cause on the ground that the State had failed to present evidence of a "scheme or artifice to defraud," within the meaning of A.R.S. §13-320.01. The motion was denied on March 2, 1977. On March 17, 1977, petitioner moved to dismiss the information on the ground that §130320.01 was unconstitutional due to vagueness. There is no record of a final ruling on that motion.

C. On May 24, 1977, petitioner entered a plea of guilty pursuant to a plea agreement with the Pima County Attorney. Under the terms of the agreement, the State dismissed all counts of the information except Count One (that pertaining to petitioner's transaction with mrs. Foley). At the plea proceedings, the court explained the nature of the charge in both statutory terminology and nontechnical language, and petitioner stated that he had in fact committed the described offense. R.T., 5/24/77, pp. 3-4. The court entered a finding that there was a factual basis for accepting the plea of guilty to Count One. R.T., 5/24/77, p. 4. The court advised petitioner of the possible maximum sentence of one to twenty years imprisonment, a fine of up to $20,000, or both, and asked petitioner if any promises regarding sentencing had been made to him. Petitioner indicated that he was aware of the possible punishment and that no promises had been made. R.T., 5/24/77, pp. 4-5. The court then advised petitioner of the rights he would waive by entering a plea, and petitioner again indicated that he understood those rights and that he desired to waive those rights and to enter a plea of guilty. R.T., 5/24/77, pp. 5-6. Petitioner's counsel stated that he had fully discussed the plea with petitioner, and that he believed petitioner's decision to enter the plea was free and voluntary. R.T., 5/24/77, p. 6.

E. On June 13, 1977, petitioner was sentenced to not less than five nor more than ten years in Arizona State Prison, and was fined in the sum of $500.

F. On direct appeal, petitioner challenged his conviction on the grounds that the plea of guilty was not supported by a factual basis, that §13-320.01 was unconstitutional because of vagueness, and that his sentence constituted cruel and unusual punishment. On a motion for rehearing, petitioner alleged that his plea of guilty was entered without an understanding of the charge, and that §13-320.01 had been applied to him in an arbitrary and discriminatory fashion. Petitioner's conviction was affirmed by the Arizona Court of Appeals, *State v. Stewart*, 2 CA-CR 1197 (Jan. 24, 1978), and a petition for review was denied by the Arizona Supreme Court.

II. *Conclusions of Law*

A. The grounds for relief urged by petitioner have been presented to the state courts, either through his brief on appeal or his motion for rehearing. Because the state appellate courts have had an opportunity to consider each of petitioner's contentions, the Court finds that petitioner has exhausted his state remedies within the meaning of 28 U.S.C. §2254(b). *Cf. Thompson v. Procunier*, 539 F.2d 26 (9th Cir. 1976).

B. Petitioner contends that "scheme or artifice to defraud," as used in A.R.S. §13-320.01, is so vague as to violate due process standards. Under the Due Process Clause, a criminal statute must give a person of ordinary intelligence, fair notice that his contemplated conduct is forbidden. *United States v. Harris*, 347 U.S. 612 (1954). A statute will not be struck down for vagueness, even if it could have been drafted with greater precision, so long as it gives sufficiently definite warning of the proscribed conduct. *Rose v. Locke*, 423 U.S. 48 (1975). According to the ordinary meaning of the terms, "scheme or artifice to defraud" denotes a plan, device, or strategy calculated to defraud another. In construing the federal mail fraud statute, 18 U.S.C. §1341, the courts have held that "scheme or artifice to defraud" requires proof that the defendant was involved in a scheme or plan reasonably calculated to deceive persons of ordinary prudence and comprehension. *United States v.*

Netterville, 553 F.2d 903 (5th Cir. 1977); *United States v. Reitscher*, 467 F.2d 269 (10th Cir. 1972). In *United States v. McNeive*, 536 F.2d 1245 (8th Cir. 1976), relied on by petitioner, the court did not condemn the mail fraud statute for vagueness. Rather, the court interpreted §1341 as requiring proof of intent to defraud, and held that the defendant's innocent acceptance of unsolicited gratuities was not within the purview of the statute. Moreover, in *United States v. Feinberg*, 535 F.2d 1004 (7th Cir. 1976), the court affirmed a conviction under §1341, holding, in part, that the statute was not unconstitutional for vagueness or otherwise. In light of the clear judicial constructions of the mail fraud statute, after which §13-320.01 was patterned, the Court finds that a person of ordinary intelligence would understand "scheme or artifice to defraud," as used in §13-320.01, to mean a plan or strategy calculated to defraud or deceive another. Because the statute gives fair notice of what conduct is proscribed, the Court concludes that §13-320.01 is not unconstitutionally vague. *See also, United States v. Louderman*, ___ F.2d ___ (9th Cir. June 16, 1978).

C. Petitioner contends that §13-320.01 is so vague as to render his guilty plea involuntary and unknowing. However, assuming petitioner is an individual of ordinary intelligence, the statutory language itself gave petitioner fair notice of the nature of the offense to which he pleaded guilty. Moreover, at the plea proceedings, the court explained the elements of the offense in unambiguous language. Absent a colorable allegation of involuntariness, such as a claim of coercion or duress, a federal court need not go beyond the transcripts of the state court proceedings if they show that the state defendant expressly indicated that his plea was voluntary and intelligent. *Edwards v. Garrison*, 529 F.2d 1374 (4th Cir. 1975). The Court finds that the state court record conclusively establishes that petitioner's plea of guilty was freely, voluntarily, and intelligently entered.

D. Petitioner contends that his plea of guilty was not supported by a factual basis. A counseled plea of guilty is an admission of guilt, and where the plea is voluntary and intelligent, it removes the issue of factual guilt from the case. *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975). Moreover, even if petitioner's claim of a lack of factual

basis were cognizable in this proceeding, the Court would reject the claim on the merits. Petitioner admitted at the plea proceedings that he knowingly made false representations to Mrs. Foley for the purpose of obtaining money or property and that he intended to use the proceeds for his own benefit. In addition, the state court had available the testimony from the preliminary hearing. The state court record reveals an adequate factual basis for petitioner's plea of guilty to Court One of the information.

E. Petitioner contends that application of § 13-320.01 to him was arbitrary and discriminatory. However, petitioner's conduct, as charged in the information, fell within the general proscription of § 13-320.01. The choice of statute under which to proceed is a matter of prosecutorial discretion, and, absent a showing of prosecutorial vindictiveness or class-based discrimination, the availability of other less severe criminal statutes does not invalidate petitioner's prosecution under § 13-320.01. *E.g., United States v Brewer*, 528 F.2d 492 (4th Cir. 1975).

F. Petitioner contends that he is being subjected to cruel and unusual punishment by virtue of the sentence imposed in state court. Because the sentence imposed is well within the statutory maximum, the only inquiry for this Court is whether the penalty is so out of proportion to the crime committed that it shocks a balanced sense of justice. *United States v. Tolias*, 548 F.2d 277 (9th Cir. 1977). Applying that standard, the Court finds that petitioner's sentence is not so severe as to warrant habeas corpus relief.

IT IS ORDERED that the petition for writ of habeas corpus is denied.

Dated: July 6, 1978

MARY ANNE RICHEY
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee,	)	
v.	)	2 CA-CR 1197
JOHN JACK STEWART, Appellant.	)	**OPINION**

APPEAL FROM THE SUPERIOR COURT
OF PIMA COUNTY
Cause No. A-31702
Honorable Robert O. Roylston, Judge

JUDGEMENT OF CONVICTION AFFIRMED and
CAUSE REMANDED WITH DIRECTIONS

Bruce E. Babbitt, The Attorney General
by William J. Schafer III and Robert S. Golden,
Assistants Attorney General — Phoenix
Attorneys for Appellee

Benjamin Lazarow, P.C.
by Benjamin Lazarow — Tucson
Attorney for Appellant

HOWARD, Judge.

Appellant was charged in an information alleging five counts of obtaining money pursuant to a fradulent scheme or artifice in violation of A.R.S. §13-320.01.

Pursuant to a plea agreement, he pled guilty to one count and the remaining four counts were dismissed. Appellant was advised at that time of the possible range of sentences. State V. Woods, 114 Ariz. 385, 561 P.2d 306 (1977). He was subsequently sentenced to a term of five to ten years in the Arizona State Prison, and a fine was imposed. The record demonstrates an inconsistency as to the amount of the fine, the transcript showing $500 and the minute entry $2,500.

Appellant challenges the factual basis for the guilty plea, the constitutionality of A.R.S. §13-320.01, the sentence imposed, and the inconsistency as to the fine. We affirm the conviction and sentence imposed, and the inconsistency as to the fine. We affirm the conviction and sentence, but remand to the trial court for clarification of the amount of the fine.

The following facts were before the court as a result of the presentence report, the two-volume preliminary hearing transcript, and the record of the change of plea hearing. On the afternoon of November 16, 1976, appellant approached the residence of Mrs. K. Foley, age 77, at 2034 East 7th St. in Tucson, Arizona. With no prior solicitation by Mrs. Foley, appellant told her that he knew the people who had worked on the house before. He initiated a conversation regarding roof repair, and asked to look at the roof. He told Mrs. Foley that spraying the roof with paint would make and keep the roof better. He said the job would cost $900 and when Mrs. Foley objected, appellant settled for $600. Mrs. Foley stated:

> "Six hundred for spraying the roof. So I didn't say really to do it or not. I just said that — and then he went out. They were only there about a half hour, and he came [sic] back and said the roof was fixed. It was done."
>
> * * *
>
> "I told him that it was a good roof, but when he said something about spraying it, I said, 'Well, I don't know anything about that', but I never really told him to go ahead and do it. I was just talking about it."

Appellant drove Mrs. Foley to her credit union to get a check, and then took her to the bank to cash it.

Two other women, ages 80 and 76 respectively, testified in connection with similar encounters with appellant on November 17 and 19, but their testimony concerned counts which were subsequently dismissed at the change of plea hearing.

We cannot agree with appellant that there was no factual basis for his guilty plea since the court had before it the presentence report, the preliminary hearing record, and the following testimony of appellant at the plea hearing:

> "THE COURT: If I accept your plea of guilty to count 1 you would be telling me on or about November the 16th of last year you, pursuant to a scheme or artifface [sic] intend to defraud or to obtain from Kathleen H. Polley (?) [sic] money by means of fraud, false, or fradulent pretenses, or promises.
>
> Did you on or about that date make certain representations to a person by that name, and that you knew these representations were false or misleading?
>
> A. [MR. STEWART] Yes, your Honor.
>
> Q. Did you intend to obtain money or property through the representations made by you?
>
> A. Yes, sir.
>
> Q. You intended to use the proceeds for your own purposes, eventually?
>
> A. Yes, your Honor."

The extended record reveals an adequate factual basis for the plea. State v. Davis, 112 Ariz. 140, 539 P.2d 897 (1975).

The court's decision as to sentence was based on this same record. From a statutory maximum of twenty years the court chose a five to ten-year sentence. A sentence within the statutory limits will not be disturbed on appeal absent a showing of a clear abuse of discretion. State v. Waldrip, 111 Ariz. 516, 533 P.2d 1151 (1975). A review of the record does not reveal an abuse of discretion, even though this was appellant's first felony conviction. In State v. Villa, 111 Ariz. 371, 530 P.2d 363 (1975), the discretion of the trial court in sentencing was not disturbed even though the defendant had no previous criminal record.

A.R.S. §13-320.01 reads:

> "Any person who, pursuant to a *scheme or artifice to defraud,* knowingly and intentionally obtains or attempts to obtain money, property or any other thing of value by means of false or fraudulent pretenses, representations or promises is guilty of a felony punishable by imprisonment in the state prison for not more than twenty years, by a fine not to exceed twenty thousand dollars, or both." Added Laws 1976, Ch. 134, § 1, eff. June 27, 1976. (Emphasis added).

Appellant claims the statute is unconstitutionally void for vagueness. In particular, he contends that the words "scheme or artifice" are indefinite. We do not agree.

An offense must be defined in terms that men of average intelligence understand and the due process clause requires only that the law give sufficient warning that men may conform their conduct to its dictates. State v. Bateman, 113 Ariz. 107, 547 P.2d 6 (1976). We believe that a man of average intelligence would understand that a "scheme to defraud" is a plan or decision to defraud and that an "artifice to defraud" is an "evil or artful strategy to defraud". Hence, a "scheme" or "artifice" to defraud is to form some plan, device or trick to perpetrate the fraud upon another. United States v. Dexter, 154 F. 890, 893, 896 (D.C.N.D. Iowa 1907).

Appellant mistakenly relies on United States v McNeive, 536 F.2d 1245 (8th Cir. 1976) for the proposition that the Arizona statute is vague. *McNeive* involved a federal mail fraud statute which is similar in some respects to our statute. Contrary to appellant's assertion, the "lack of definite standards" mentioned in *McNeive* does not concern the meaning of the phrase, "scheme or artifice to defraud", but whether the word "property" as used in the federal statute includes intangible rights or interests such as intangible political and civil rights. We are not concerned with these intangible rights here and the statute clearly, definitely and unambiguously applies to appellant's conduct.

We affirm the judgment of conviction and the portion of the sentence as to imprisonment. The cause is remanded to clarify the sentence as to the amount of the fine actually imposed.

LAWRENCE HOWARD, Judge.

CONCURRING:

JAMES D. HATHAWAY, Judge.
JAMES L. RICHMOND, Chief Judge.